



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MATRIMONIAL PROPERTY CAUSE NO. 1 OF 2019

WM.....PLAINTIFF/APPLICANT

-VERSUS-

LMK.....DEFENDANT/RESPONDENT

AND

HMN.....1ST INTERESTED PARTY

MWK.....2ND INTERESTED PARTY

RULING

1. This is a ruling on the plaintiff's Motion on Notice dated 8th February 2021. It is brought under *Sections 1a, 1b, 3a and 63(c) of the Civil Procedure Act, Section 68 of The Land Registration Act, 2012, Order 40 Rules 1 and Order 51 Rule 1 and 3 of the Civil Procedure Rules* and all other enabling provisions of the law seeking the following orders:-

i. Spent

ii. Spent

iii. Spent

iv. That a temporary injunction do issue restraining the respondents by themselves, family members, servants and agents from entering, remaining, cultivating, demolishing buildings or in any other way interfering with the plaintiff's use and possession of Title No. Sipili/Donyoloip Block x/xxxx (Mutukanio) until the hearing and determination of the instant suit.

v. That pending the hearing and determination of this suit, there be an order of inhibition restricting any adverse dealings with:

· Title No. Sipili Donyoloip Block x/ xxxx (Mutukanio)

· Title No. Sipili Donyoloip Block x/ xxxx (Mutukanio)

· Title No. Gilgil/ Karunga Block xx/ xxxx (Gathigiriri)

· Title No. Gilgil/ Karunga Block x/xxx

· Title No. Nyandarua/ South Kinangop/xxxx

vi. That the OCPP Sipili Police Post do enforce compliance with the court orders issued herein.

vii. That the costs of the application be provided for.

2. The application is supported by the affidavit of WM, the plaintiff/ applicant herein and on the following grounds inter alia:

3. The plaintiff filed this suit seeking for division of matrimonial property. The plaintiff has been in exclusive use and occupation of Title No. Sipili/Donyoloip Block x/xxxx (Mutukanio), the suit land herein ever since its acquisition.

4. On 1st February 2021, the interested party/ respondent entered upon Title No. Sipili/Donyoloip Block x/xxxx (Mutukanio) and ploughed the whole of it using a tractor in readiness for planting seasonal crops claiming that he had refunded the purchase price paid by the defendant/respondent in respect thereof. The takeover of the said land parcel which has been under cultivation of the plaintiff shall leave her and members of her family without a means of subsistence.
5. The interested party/ respondent has threatened to demolish the plaintiff's residential houses which shall leave her and her family members destitute. The defendant/respondent is in the process of selling the land parcels which are the subject matter of the instant suit and unless such action is inhibited the application and entire suit shall be rendered nugatory.
6. If the prayers sought herein are not granted the substratum of the suit will be adversely altered thereby placing the plaintiff at a disadvantage. It is in the interest of justice that the orders sought herein be granted. The applicant reiterated the aforementioned grounds in the supporting affidavit dated 8th February 2021 adding that she stands to suffer irreparable damage if she is evicted and left without a means of subsistence. That the defendant and the interested party are perpetuating the acts complained of with the sole intention of defeating the instant suit.
7. She averred that her attempts to seek intervention of the police and officers within the provincial administration have been fruitless and unless the OCCP Sipili Police Post is ordered to enforce the court order, the respondents shall continue acting with impunity. On the other hand, the defendant/respondent in the replying affidavit dated 14th April 2021 contended that he is the equitable owner of all that parcel of land known as Sipili/Donyoloip Block x/xxxx (Mutukanio) and that he is constitutionally free to deal with his land as he may deem fit.
8. It was his averment that he acquired the aforesaid land and other properties and that the applicant is a stranger and has never contributed towards acquisition of the same. That she was not a witness in the sale agreement and does not live in the disputed land and she is trying to grab his land.
9. The respondent further deponed that all properties known as Sipili/Donyoloip Block x/xxxx, Gilgil/Karunga/ Block xx/xxxx and Gilgil/Karunga Block x- Ballot No. xxx (Mukunye) are not mentioned in the main suit and are being introduced in this application.
10. The 1st interested party herein vide the replying affidavit dated 18th May 2021 deponed that it is not true that he had taken over, cultivated or ploughed the land herein as claimed by the plaintiff. That he sold the land to the defendant herein and handed over the land to him.
11. He averred that subsequently and in particular on 9th August 2018 he is aware that the defendant sold the land to one, MWK, the purchaser herein and that he is aware of the same as both the defendant and the purchaser sought his intervention to have the parcel directly transferred to the aforesaid purchaser as at the time she was sold the land the defendant had not transferred the land to himself though he had given him the requisite documents.
12. The interested party contended that he was aware that it was the purchaser who had been cultivating the land and occupying the same as at one point last year he was summoned by the local administration to shed light on the matter and that the plaintiff is well aware of this position and deliberately failed to sue or enjoin the purchaser.
13. It was his averment that having disposed off the land and having no further interest thereon he should not be dragged into court on matters involving the plaintiff, the defendant and the purchaser and he should be paid for being dragged to court unnecessarily.
14. It was his prayer that he be expunged from this proceeding and the plaintiff be directed to sue the right parties. MWK, the purchaser, henceforth known as the 2nd interested party herein, in her replying affidavit dated 27th July 2021 deponed that she purchased the suit land from the defendant on 9th August 2018 at a consideration of 900,000/-
15. That at the time of purchasing the property from the defendant she had conducted a search which showed that there were no encumbrances and that there was also no one in occupation of the suit land at that time and the claims by the plaintiff that she was in occupation of the suit land all along are pure falsehoods.
16. That it is clear from the pleadings filed herein that at the time of institution of the matrimonial cause herein the suit land had already been disposed off to me by the defendant who had already received the entire consideration and cannot therefore form part of the matrimonial property falling for subdivision.
17. That the plaintiff only started staking claims over the property after she started cultivating the land and making arrangements to construct a dwelling house thereon when she mobilized a gang of boda boda operators to stop her from cultivating and that the plaintiff only entered the suit land after she obtained the orders issued by this court on 8th February 2021.
18. That the suit land is not registered in the defendant's name and the defendant having disposed off his interests over the same to her and received the entire consideration it can no longer be part of matrimonial property.
19. The 2nd interested party asserted that she is opposed to the orders sought by the plaintiff as it will mean that she is deprived of use of the land yet the defendant has her money which she paid for purchase of the land.

1ST AND 2ND INTERESTED PARTIES SUBMISSIONS

20. The interest parties submitted that the suit land has never been registered and or transferred into the names of the defendant and is even at this particular minute register in the names of the 1st interested party. They further submitted that the suit land cannot form part of the matrimonial property that would fall for distribution between the plaintiff and the defendant for the reasons that:

21. The said land even after the defendant purchased the same was never transferred to the defendant by the 1st interested party for it to become either his property or matrimonial property thereof for which the plaintiff can stake a claim. The defendant did dispose off his interest and rights over the property to the 2nd interested party for valuable consideration long before the suit herein was filed.

22. It was their submission that if plaintiff's argument that the sale between the defendant and the 2nd interested party was null and void for want of spousal consent then the same would equally apply to the sale between the defendant and the 1st interested party noting as it is the plaintiff has not exhibited any spousal consent by the spouse of the 1st interested party or that there was no requirement for the same for the said transaction.

23. The interested parties contended that the plaintiff having not been a party to the transaction between the defendant and the 1st interested party cannot enjoy any benefits accruing from the same and cannot even enforce it.

24. They asserted that in so far as it relates to them, the plaintiff had not satisfied the requirements of the grant of temporary injunction as the land is registered in the names of the 1st interested party and has been sold to the 2nd interested party who has all along been in occupation and use of the same.

25. Lastly, the prayed for dismissal of this application in as far as it relates to the parcel of land number Sipili/Donyoloip Block x/ xxxx (Mutukanio) with costs to the interested parties.

26. **Respondent's Submissions; was not availed as at the time of drafting instant ruling.**

ANALYSIS AND DETERMINATION

27. Having considered the application by the plaintiff/applicant and the grounds thereof as well as the supporting affidavit and annexures and the responses by the Defendant/Respondent and the respective interested parties together with the written submissions and the annexures on, the issues for determination herein include: -

a) Whether the plaintiff/applicant has made out a case for the granting of orders of temporary injunction.

b) Whether the plaintiff/applicant has made out a case for the granting of orders of inhibition restricting any adverse dealings with the properties mentioned.

a) Whether the plaintiff/applicant has made out a case for the granting of orders of temporary injunction.

28. The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

29. The law governing the granting of interlocutory injunction is set out under **Order 40(1) (a) and (b) of The Civil Procedure Rules 2010** which provides that: -

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

30. Further, the test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. v Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely: -

31. ***There must be a serious/fair issue to be tried,***

a. ii. Damages are not an adequate remedy,

b. iii. The balance of convenience lies in favour of granting or refusing the application

32. In the instant application, the plaintiff contended that she stands to suffer irreparable damage if she is evicted from suit land and left without a means of subsistence. She alleged that she has been in exclusive use and occupation of the suit land ever since its acquisition. Additionally, she submitted that on 1st February 2021, the 1st interested party/ respondent entered upon the suit land and ploughed the whole of it using a tractor in readiness for planting seasonal crops claiming that he had refunded the purchase price paid by the defendant/respondent in respect thereof. In rebuttal, the defendant contended that he is the equitable owner of all that parcel of land known as Sipili/Donyoloip Block x/xxxx (Mutukanio) and that he is constitutionally free to deal with his land as he may deem fit.

33. On the other hand, the 1st interested party stated that it is not true that he had taken over, cultivated or ploughed the suit land as claimed by the plaintiff and that he sold the land to the defendant herein and handed over the land to him who sold the land to one, MWK, the 2nd interested party.

34. The 2nd interested party deponed that she purchased the suit land from the defendant on 9th August 2018 at a consideration of 900,000/- and That at the time of purchasing the property from the defendant she had conducted a search which showed that there were no encumbrances and that there was also no one in occupation of the suit land at that time and the claims by the plaintiff that she was in occupation of the suit land all along are pure falsehoods. Further, the said land even after the defendant purchased the same was never transferred to the defendant by the 1st interested party for it to become either his property or matrimonial property thereof for which the plaintiff can stake a claim. She stated that the plaintiff only entered the suit land after she obtained the orders issued by this court on 8th February 2021.

35. Indisputably, the suit land is still under the 1st interested party's name as evident in the certificate of official search (**marked MWK4**) and there is sufficient evidence to indicate that the suit land was indeed sold to the 2nd interested party given the copies of the land sale agreement, payment receipts and acknowledgements attached by the 2nd interested party (**marked MWK1 (a) & (b), MWK2, MWK3 (a) and (b)**). The 1st interested party also corroborates the 2nd interested party's account. It is also evident that the land was sold to the 2nd interested party on 9th August 2018 as per the land sale agreement for a consideration of KShs. 900,000/- and the acknowledgement for full and final payment of the consideration was dated 11th February 2019 which was all before the plaintiff instituted the main suit on 8th March 2019.

36. In my humble view, the plaintiff's application has not met the threshold set for the granting of orders of temporary injunction. It is important to note that injunctions are not meant to be punitive of a party to a proceeding but are meant to preserve the state of things pending the court investigating the dispute. In the instant suit, the suit land had been sold to the 2nd interested party long before the plaintiff instituted that main suit. In any case, the applicant has not proven on a balance of probabilities that she was indeed in occupation of the said land. She did attach photos of the suit land which indicate that the land had been ploughed, a fact that the 2nd interested party admits to have done but there is no proof that the plaintiff has been in exclusive use and occupation of the suit land.

37. In *Mrao Ltd v First American Bank of Kenya and 2 others. (2003) KLR 125* which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others. (2014) eKLR*, the Court of Appeal defined a prima facie case as: -

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

38. Moreover, in *Showind Industries v Guardian Bank Limited & Another (2002) 1 EA 284* the Learned Judge stated as follows: -

".....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"

39. I am also associate myself with the decision in *Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012*, as cited in the case of *Peter Kairu Gitu v KCB Bank Kenya Limited & another [2021] eKLR*, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

a. "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) Establish his case only at a prima facie level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) All any doubts as to (b) by showing that the balance of convenience is in his favour.

b. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that

stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

40. In the instant application, the question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. It is my finding that the plaintiff has not established the three pillars that are the foundation of any order of injunction. In any case, she has the opportunity to recover in damages from the proceeds of sale from the defendant should the main suit succeed.

b) Whether the plaintiff/applicant has made out a case for the granting of orders of inhibition restricting any adverse dealings with the properties mentioned.

41. Having considered the plaintiff’s and defendant’s position in respect to this issue, it is my view that the defendant will not suffer any loss or prejudice if this order is granted and in view to preserve the properties hereunder pending the determination of the main suit, I will grant this order in respect to:

- Title No. Sipili Donyoloip Block x/ xxxx (Mutukanio)
- Title No. Gilgil/ Karunga Block xx/ xxxx (Gathigiriri)
- Title No. Gilgil/ Karunga Block x/ xxx
- Title No. Nyandarua/ South Kinangop/ xxxx

42. The upshot is that the application succeeds partially, and I therefore make the following orders: -

i. That an order of inhibition do issue restricting any adverse dealings with: -

- a) Title No. Sipili Donyoloip Block x/ xxxx (Mutukanio)***
- b) Title No. Gilgil/ Karunga Block xx/ xxxx (Gathigiriri)***
- c) Title No. Gilgil/ Karunga Block x/ xxx***
- d) Title No. Nyandarua/ South Kinangop/ xxxx***

ii. That each party bears it’s on costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 5TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE